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VISA U.S.A. INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

VISA U.S.A. INC.,

Plaintiff,

vs.

MARITZ INC., d/b/a MARITZ
LOYALTY MARKETING,

Defendant.

MARITZ INC., d/b/a MARITZ
LOYALTY MARKETING,

Counterclaimant,

vs.

VISA U.S.A. INC. and CARLSON
MARKETING GROUP, INC.,

Counterclaim Respondents.

Case No. CV-07-5585 JSW

**NOTICE OF MOTION AND MOTION TO
DISMISS MARITZ'S FRAUD
COUNTERCLAIMS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: April 18, 2008
Time: 9:00 a.m.
Courtroom: 2 (17th Floor)
Hon. Jeffrey S. White

NOTICE OF MOTION AND MOTION

On April 18, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard, at 450 Golden Gate Avenue, San Francisco, California, in Courtroom 2, 17th Floor, before the Honorable Jeffrey S. White, Plaintiff Visa U.S.A. Inc. ("Visa") shall and hereby does move the Court, pursuant to Federal Rules of Civil Procedure 12(b)(6), 12(e) and 9(b), for an Order dismissing Defendant and Counterclaimant Maritz Loyalty Marketing's ("Maritz") Counterclaim Counts III (Fraud), IV (Negligent Misrepresentation), Count V (Fraud Related to Arbitration) and Count VI (Unfair Competition Under Business & Professions Code Section 17200). This Motion is based upon this Notice of Motion and Motion, the following Memorandum of Points and Authorities, all files and records in this action and such additional matters as may be judicially noticed or may come before the Court prior to or at the hearing on this matter.

Dated: February 21, 2008

FARELLA BRAUN & MARTEL LLP

By: /s/ Roderick M. Thompson
Roderick M. Thompson

Attorneys for Plaintiff and Counterclaim
Respondent VISA U.S.A. INC.

SUMMARY OF ARGUMENT

In its December 20, 2007 Answer and Counterclaim (“Counterclaim”), Maritz Inc. d/b/a Maritz Loyalty Marketing (“Maritz”) purports to assert four fraud-based claims against Visa U.S.A., Inc. (“Visa”): Count III (Fraud), Count IV (Negligent Misrepresentation), Count V (Fraud Related to Arbitration) and Count VI (Unfair Competition Under Business & Professions Code Section 17200). Each of these counts is defective and must be dismissed.

Counts III and IV are based on nearly-identical general and conclusory allegations that “Visa fraudulently misled Maritz in connection with the Rewards Program and/or the MSA.” (D.E. #19, Counterclaim ¶ 81; *see also* ¶ 99.) These vague and conclusory allegations are insufficient for three separate reasons. First, although it appears that Maritz contends that Visa made a number of fraudulent statements, it only identifies two “examples.” Fraud cannot be pled through “examples,” however. Second, even for the limited “examples” Maritz provides, Maritz has failed to allege “‘the who, what, when, where, and how’ of the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). Third, although Maritz bases part of these claims on Visa’s purported “fraudulent concealment,” Maritz has alleged no facts that give rise to a duty to disclose, a necessary predicate of any such fraud claim.

Count V purports to state a claim based upon the allegation that Visa failed “to disclose the nature and magnitude of its alleged claims in order to try and deceive Maritz into agreeing to an arbitration.” (D.E. #19, Counterclaim ¶ 118.) As with Counts III and IV, however, Maritz’s attempt to state a claim predicated on Visa’s alleged failure to disclose is legally deficient because Maritz has failed to allege any facts that would create a duty for Visa to disclose the purportedly concealed facts.

Count VI, like the other fraud based counts, fails to identify with the requisite particularity the purported fraud that underlies the claim. In the alternative, the claim is too ambiguous or vague to respond to and a more definite statement is required.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On November 2, 2007, Visa filed a Complaint against Maritz, seeking to compel arbitration of its underlying breach of contract or, in the alternative, seeking judicial resolution of the merits of its breach of contract claim. (D.E. # 1.) In response, on December 20, 2007, Maritz filed an answer and six counterclaims against Visa, alleging, *inter alia*, fraud and negligent misrepresentation. (D.E. #19.) This motion addresses Counts III, IV, V and VI.

Counts III (Fraud) and IV (Negligent Misrepresentation) are predicated on Maritz's claims that Visa "fraudulently misled [or made negligent misrepresentations to] Maritz in connection with the Rewards Program and/or the MSA." (D.E. #19, Counterclaim ¶¶ 81 and 99.) Maritz purports to state both counts by citing two "examples" of Visa's alleged bad acts:

(1) "Visa fraudulently failed to disclose to Maritz the full scope of what would be involved with respect to the Rewards Plan project" (D.E. #19, Counterclaim ¶¶ 83, 101); and

(2) "Visa further misled Maritz with respect to whether Visa was going to continue the Rewards Program project with Maritz or whether Visa instead was going to continue using Carlson." (D.E. #19, Counterclaim ¶ 90; *see also* ¶ 106).

As is explained in detail below, these vague, general allegations are insufficient to support fraud claims. Preliminarily, fraud cannot be pled by "example;" a party stating a claim for fraud must specifically identify each allegedly fraudulent statement by pleading "'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted). Moreover, to state a claim for fraud by omission, plaintiff must allege facts sufficient to give rise to a duty to disclose. *See In re Herbalife Secs. Litig.*, 1996 U.S. Dist. LEXIS 11484 *10 (C.D. Cal. 1996) (granting defendant's motion to dismiss because the plaintiff did not allege facts sufficient to prove that the defendant had a duty to disclose). Here, Maritz has alleged no such facts.

Count V (Fraud Related to Arbitration) arises from Maritz's claim that Visa's "failure to disclose the nature and magnitude of its alleged claims" induced Maritz to enter an agreement to arbitrate. (D.E. #19, Counterclaim, ¶ 118.) Again, however, Maritz has failed to allege any facts that, if true, would give rise to a duty on Visa's part to disclose such information to Maritz.

Finally, Count VI (Unfair Competition Under Business & Professions Code Section 17200) must be dismissed. In it, Maritz alleges only that "Visa's acts and omissions alleged above constitute unlawful business practices." To the extent this claim is intended to be predicated on the fraud counts, it fails for the same reasons as the fraud claims. Moreover, because the allegations are so general, it is impossible for Visa to determine what conduct Maritz claims constitute the purported unlawful business practices.

II. ARGUMENT

A. Count III (Fraud) and Count IV (Negligent Misrepresentation) Are Inadequately Pled.

Rule 9(b) requires that plaintiff "state with particularity" the "circumstances constituting fraud." Federal Rule of Civil Procedure 9(b); *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1027-28 (9th Cir. 2005) (Rule 9(b) applied to plaintiffs' fraud claims). Rule 9(b) applies with equal force to claims for negligent misrepresentation. *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) ("It is well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements."); *Glen Holly Entm't, Inc. v. Tektronix*, 343 F.3d 1000, 1005 (9th Cir. 2003) (same).

The Ninth Circuit has recognized that because of the damage to a defendant's reputation caused by allegations of fraud in a federal complaint, regardless of the cause of action in which they appear, all averments of fraud are subject to the heightened pleading standard of Rule 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d at 1104. This stringent standard requires that "[a]verments of fraud [] be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id.* at 1106 (citation omitted). Additionally, "to allege fraud with particularity," plaintiff "must set forth what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc. Secs. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (*en banc*). When a

1 fraudulent statement is alleged, plaintiff must also set forth why it was false when made. *Fecht v.*
 2 *Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995). In particular, vague, generalized, and/or
 3 conclusory allegations are insufficient to satisfy Rule 9(b)'s "particularity" standard. *See Moore*
 4 *v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

5 Here, both Count III and Count IV fail to plead the requisite level of particularity under
 6 Rule 9(b). Because the alleged facts are nearly identical for both Counts (*compare* D.E. #19,
 7 Counterclaim ¶¶ 80-97 *with* ¶¶ 99-112), the insufficiency of the facts apply to both Counts.

8 **1. Fraud Cannot Be Pled By "Example." To Satisfy Rule 9(b)'s**
 9 **Requirement That Fraud Be Pled "With Particularity," the Who,**
 10 **What, When, Where and How As To Each Allegedly Fraudulent**
Statement Must Be Pled.

11 Both Count III and IV contain only "examples" of Visa's alleged fraud. (*See, e.g.*, D.E.
 12 #19, Counterclaim ¶¶ 82, 83, 91, 100, 101.) Maritz's admission that it alleges only "examples,"
 13 however, is a clear indication that it fails to plead with particularity; a claimant simply cannot
 14 meet the heightened pleading standard by providing only "examples" of the purported fraud.
 15 Simply put, allegations of fraud where the fraud is described "for example" are not alleged "with
 16 particularity." Moreover, because Maritz has identified only two "examples" of Visa's alleged
 17 fraud, Visa cannot reasonably investigate and prepare an answer to Maritz's fraud claims.¹

18 Indeed, that Maritz appears to be attempting to assert broad fraud claims against Visa
 19 while providing only limited "examples" of the purported fraud raises the suspicion that Maritz is
 20 attempting to use its counterclaim as a pretext for conducting discovery to unearth bases for
 21 additional claims. Rule 9(b)'s heightened pleading requirements are intended to prevent exactly
 22 that. *See Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) (Rule 9(b) is intended to
 23 "prevent[] the filing of a complaint as a pretext for the discovery of unknown wrongs").

24
 25 ¹ In the alternative, Visa moves under Rule 12(e) for a more definite statement of Maritz's
 26 fraud claims. Whether required by Rule 9(b) or Rule 12(e) (or both), Maritz must allege with
 27 particularity each purported statement and omission that it claims was wrongful to enable Visa to
 28 respond adequately. *See Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1280 (11th Cir.
 2006) (recognizing "the utility of employing Rule 12(e) repleadings to clarify fraud claims in
 order to obtain the required degree of factual particularity").

2. **Maritz's Allegations of Non-Disclosure Fail To State A Claim For Fraud Both Because Maritz Has Failed to Plead Facts That Would Give Rise To A Duty To Disclose And Because The Alleged Omissions Are Not Pled With Sufficient Particularity.**

With respect to the two alleged "examples" Maritz cites, the fraud claims are still defective. Both Count III and Count IV are based, in part, on allegations that Visa fraudulently "failed to disclose to Maritz the full scope of what would be involved with respect to the Rewards Plan project." (D.E. #19, Counterclaim ¶¶ 83, 101.) These allegations suffer from two flaws: first, there are no facts alleged that would support a finding that Visa had any duty to disclose to Maritz. Second, Maritz fails to provide specific details of the scope of the Rewards Plan project Visa allegedly concealed.

Under Rule 12(b)(6) a motion to dismiss should be granted either if there is a lack of a cognizable legal theory or if there are insufficient facts to state a claim under a cognizable legal theory. *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988); *U.S.A. v. Nutrasource, Inc. v. CNA Ins. Co.*, 140 F.Supp.2d 1049, 1053 (N.D. Cal. 2001). To survive a Rule 12(b)(6) challenge, plaintiff's claim of fraudulent inducement must allege some set of facts which establish the elements of a fraud claim, including in a case of non disclosure, a legal duty to disclose. *See In re Herbalife*, 1996 U.S. Dist. LEXIS 11484 at *10 (granting defendant's motion to dismiss because plaintiff failed to allege facts sufficient to establish defendant had duty to disclose).

Here, Maritz's fraud claims based on Visa's alleged non-disclosures must be dismissed: Maritz has not alleged any facts that would give rise to a duty to disclose by Visa. Indeed, Maritz claims that the alleged omissions damaged it in that if the concealed facts had been disclosed, "Maritz would not have agreed to the terms in the MSA." (D.E. #19, Counterclaim ¶ 86; *see also* ¶ 101 ("Visa negligently failed to disclose to Maritz the full scope of what would be involved with respect to the Rewards Plan project . . . [which] induced Maritz to enter into the MSA.)) Yet there is no allegation at all regarding the nature of the parties' relationship before the MSA was executed (*see* D.E. #19, Counterclaim ¶ 11 ("In April 2006, Visa entered the MSA with Maritz")), much less anything supporting an argument that the relationship was such that Visa

1 owed Maritz a duty to disclose.

2 Even assuming, however, that there were some factual allegations that would give rise to
3 such a duty, Maritz's fraudulent concealment allegations are still deficient. Noticeably absent in
4 Maritz's generalized pleading are any of the following:

5 (1) **Who**: which individuals within Visa are purportedly responsible for the
6 concealment of the "full scope" of the Rewards Program;

7 (2) **What** specifically regarding the Rewards Program was concealed; and

8 (3) **When** the alleged concealment happened.

9 *See Vess v. Ciba-Geigy Corp. USA.*, 317 F.3d at 1106 (9th Cir. 2003) (the specific "[a]verments
10 of fraud [] be accompanied by 'the who, what, when, where, and how' of the misconduct
11 charged") (citation omitted).

12 The only "example" Maritz provides for its non-disclosure claim is that Visa purportedly
13 failed to disclose "that Maritz was going to have to comply with Visa's Key Controls security
14 requirements." (D.E. #19, Counterclaim ¶ 83.) But even this "example" does not provide the
15 requisite specificity; Maritz fails to plead the requisite "who" and "when" of this alleged non-
16 disclosure. *Id.* More specifically, because "[a]n entity speaks through its agents[.]" Maritz is
17 required to identify the particular individuals at Visa; "[a]llegations that fail to identify the agents
18 who speak for the entity do not satisfy Rule 9(b)." *Kriendler v. Chem. Waste Mgmt.*, 877 F.
19 Supp. 1140, 1155 (N.D. Ill. 1995); *see also Arena v. Wal-Mart Stores, Inc.*, 221 F.R.D. 569, 572
20 (D. Kan. 2004) ("Plaintiffs' general references to 'Wal-Mart and CMN' are insufficient to
21 identify the speaker of these statements."); *Gottstein v. Nat'l Ass'n for the Self Employed*, 53 F.
22 Supp. 2d 1212, 1218 (D. Kan. 1999) (in context of corporate defendants, plaintiffs must identify
23 specific individuals who made alleged misrepresentations).

24 **3. The Alleged Fraud With Respect To The Continuation Of The** 25 **Program Is Insufficiently Pled**

26 Maritz's second "example" relates to alleged Visa representations of whether "Visa was
27 going to continue the Rewards Program project with Maritz or whether Visa instead was going to
28 continue using Carlson." (D.E. #19, Counterclaim ¶ 90.) Although Maritz addresses the who and

1 when elements of this allegation, it fails to allege why the representations in December 2006 were
 2 false at that time. *Fecht*, 70 F.3d at 1082; *see also In re Gupta Corp. Sec. Litig.*, 900 F. Supp.
 3 1217, 1228 (N.D. Cal. 1994) (citation omitted). Moreover, Maritz cannot meet the Rule 9(b)
 4 particularity standard by conclusorily alleging “[o]n information and belief” that “Visa was not as
 5 committed to Maritz as Visa led Maritz to believe.” (D.E. #19, Counterclaim ¶¶ 96, 111.) *See*
 6 *Moore*, 885 F.2d at 540.

7 **B. Count V (Fraud Related to Arbitration) Fails to State A Claim Because**
 8 **Maritz Alleges No Facts That Would Give Rise To A Duty To Disclose By**
 9 **Visa.**

10 Maritz has alleged that Visa attempted to deceive Maritz into agreeing to an arbitration of
 11 Visa’s claims. (D.E. #19, Counterclaim ¶ 116.) Maritz claims that Visa failed to disclose to
 12 Maritz that Visa was planning to assert a claim of tens of millions of dollars from Maritz for
 13 Maritz’s alleged breaches of the MSA. (*Id.*, ¶ 117.) This is the full extent of Maritz’s factual
 14 allegations as to Claim V and in fact, there is no discussion of the events given rise to this
 15 purported fraud in Maritz’s Background.

16 As discussed above, to state a claim of fraud based on a nondisclosure of a purportedly
 17 material fact, the charging party must first plead facts that establish that the party that withheld
 18 the information had a duty at law to disclose. *People v. Highland Fed. Sav. & Loan*, 14 Cal. App.
 19 1692, 1718-19 (1993); *see also In re Herbalife*, 1996 U.S. Dist. LEXIS 11484 at *10 (granting
 20 defendant's motion to dismiss because plaintiff failed to allege facts sufficient to establish
 21 defendant had duty to disclose). Here, no such facts have been alleged.

22 A duty to disclose arises only in a limited set of circumstances. A duty to disclose
 23 typically arises where the party charged with fraud has volunteered information on a subject but
 24 withholds information that would materially qualify the information disclosed. *Brownlee v.*
 25 *Vang*, 235 Cal. App. 2d 465, 477 (1965). A duty to disclose may also arise where the parties
 26 stand in the position of fiduciaries or share a similar relationship of trust and confidence. *Moe v.*
 27 *Transamerica Title Ins. Co.*, 21 Cal. App. 3d 289, 306 (1971). Finally, a party also has to
 28 exercise reasonable care to disclose facts basic to the transaction in question, if he knows that the
 other party is about to enter into it under a mistake as to that fact, and the other party, because of

1 the relationship between them, the customs of the trade or other objective circumstances, would
 2 reasonably expect a disclosure of those facts. *Apte v. Japra (in Re Apte)*, 96 F.3d 1319, 1324 (9th
 3 Cir. 1996).²

4 Maritz has failed to allege any facts that would support a finding of duty. Maritz makes
 5 no allegations which show that Visa made any statement as to the nature of its claims or damages
 6 at all, or even a partial, incomplete or ambiguous statement on these topics that required a further
 7 disclosure. Nor does Maritz allege any facts which would establish that the parties stood in a
 8 position of confidence or trust.³

9 Maritz also fails to allege any facts which show that 1) Visa knew that Maritz was
 10 mistaken as to the nature or amount of the size of its damages; or 2) that because of the
 11 relationship between the parties, the customs of the trade, or other objective circumstances that
 12 Maritz would have expected Visa to disclose this information. As to the first element Maritz
 13 simply asserts in conclusory fashion that “Visa’s failure to disclose the nature and magnitude of
 14 its alleged claims in order to try to deceive Maritz into agreeing to an arbitration was intentional,
 15 deceitful, misleading, in bad faith, and also in breach of Visa’s obligations under Section XII of
 16 the MSA.” (D.E. #19, Counterclaim ¶ 118.) Conclusory contentions, however, are insufficient;
 17 Maritz must allege *facts* that support its conclusions. *Epstein v. Washington Energy Co.*, 83 F.3d
 18 1136, 1140 (9th Cir. 1996).

19 Maritz has alleged no facts which, if true, would give rise to a duty on Visa’s behalf to
 20 disclose the information which forms that basis of Count V of Maritz’s Counterclaim. Count V,

21 ² The Second Restatement of Torts § 551 also imposes a duty to disclose where the party
 22 charged with fraud subsequently acquires information which he knows will make a previous
 23 statement untrue. This section also imposes liability on a party if they have made a false
 24 misrepresentation but did not intend that the other party rely upon it and he subsequently learns
 25 that the other is about to act in reliance upon the misrepresentation. Like the other elements
 26 necessary to establish a duty, there is simply no actual or even hypothetical scenario that the
 27 Court may assume based on the currently pled facts that would give rise to a duty under these
 28 additional tests.

³ As to this point the only reference which Maritz makes is that the parties were obligated to
 act in good faith in resolving any disputes arising under the MSA. (D.E. #19, Counterclaim
 ¶ 114.) Yet, that the parties had a contractual obligation to work to resolve disputes in good faith
 does not create an independent duty to disclose in Visa. Importantly, Maritz alleges no facts that
 show how this contractual obligation could have created such a duty, allegations that are essential
 to its claim.

1 therefore, must be dismissed.

2 **C. Count VI (Unfair Competition Under Business & Professions Code Section**
 3 **17200) Should Be Dismissed Because Maritz Fails To Allege The Underlying**
 4 **“Bad Acts” With Particularity**

5 In what appears to have been a catch-all afterthought, Maritz also purports to assert a
 6 claim against Visa for Unfair Competition under Section 17200 of California’s Business and
 7 Professions Code. The claim, however, is so general and vague as to be unintelligible.

8 After incorporating 68 other paragraphs of its Counterclaim, Maritz alleges only “Visa’s
 9 acts and omissions alleged above constitute unlawful business practices in violation of Section
 10 17200, et. seq., of the California Business and Professions Code.” (D.E. #19, Counterclaim
 11 ¶ 130.) It is impossible to know what Maritz claims the unfair business practices were. To the
 12 extent they are based on the alleged fraud discussed above, therefore “sounding in fraud”), this
 13 count is defective for the reasons discussed above and should be dismissed for the same reasons.
 14 See *In re Daou*, 411 F.3d at 1027-28 (claim was governed by Rule 9(b) where plaintiffs alleged
 15 fraud and “fully incorporate[d] all allegations previously averred in the complaint for purposes of
 16 all their claims”). In any event, Maritz should be required to provide a more definite statement
 17 under Rule 12(e) resolving all ambiguity by specifying each of the purported unfair business
 18 practices that underlie this claim. See *Optovue Corp. v. Carl Zeiss Meditec, Inc.*, 2007 WL
 19 2406885 at * 3 (N.D. Cal. Aug. 20, 2007) (granting Rule 12(e) motion for a more definite
 20 statement of Section 17200 declaratory claim “where the complaint is so general that ambiguity
 21 arises in determining the nature of the claim or the parties against whom it is being made”) (quotation omitted).

22 **III. CONCLUSION**

23 Maritz has asserted serious claims of fraud and deceit against Visa. To charge Visa with
 24 fraud, however, Maritz must plead “with particularity” the facts underlying its allegations: the
 25 who, what, where, when and how of each purported fraudulent statement. Maritz has failed to do
 26 so. Indeed, nowhere in Maritz’s 141-paragraph Counterclaim are there any factual allegations
 27 either describing the purported fraud “with particularity” as required by Rule 9(b) or that support
 28 Maritz’s implicit allegation that Visa owed Maritz a duty to disclose.

1 For the foregoing reasons, Counts III (Fraud), IV (Negligent Misrepresentation), V (Fraud
2 Related to Arbitration) and VI (Unfair Competition Under Business & Professions Code Section
3 17200) should be dismissed.

4 Dated: February 21, 2008

FARELLA BRAUN & MARTEL LLP

6 By: /s/ Roderick M. Thompson
7 Roderick M. Thompson

8 Attorneys for Plaintiff and
9 Counterclaim Respondent
10 VISA U.S.A. INC.